

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion,) Rule and Regulation No. 202
seeking to establish Title 291, Chapter 16, to adopt)
Reverse Auction and Wireless Registry rules and)
regulations in accordance with Nebraska Legislative Bill)
994 [2018].)

**COMMENTS OF QWEST CORPORATION d/b/a/ CENTURYLINK QC
AND UNITED TELEPHONE COMPANY OF THE WEST d/b/a CENTURYLINK**

Pursuant to Commission Order dated October 8, 2019 in the above-referenced docket, Qwest Corporation d/b/a CenturyLink QC and United Telephone Company of the West d/b/a CenturyLink (collectively, “CenturyLink”) hereby respectfully provide these comments to the proposed Reverse Auction and Wireless Registry Rules and Regulations:

1. On April 11, 2018, the Nebraska Legislature passed Legislative Bill 994 (“LB 994”), which was signed by Governor Ricketts on April 18, 2018 and codified at Neb. Rev. Stat. § 86-330. It requires the Nebraska Public Service Commission (“Commission”) to, among other things, “adopt and promulgate rules and regulations *that establish standards* governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund from any recipient.”¹ The legislation further allows the Commission to “use the funding that is withdrawn to implement and operate a reverse auction program.”²

2. On March 12, 2019, the Commission issued an Order Opening Docket, Releasing Proposed Rules, Seeking Comment, and Setting Hearing, in which it issued the proposed rules for the implementation of Neb. Rev. Stat. § 86-330. CenturyLink provided comments and recommendations on

¹ Neb. Rev. Stat. § 86-330 (emphasis added).

² *Ibid*

April 18, 2019 and offered comments at the Commission's public hearing on May 7, 2019 in Lincoln.

Finally, the Commission conducted a public workshop on July 16, 2019 in Lincoln.

3. The Commission issued its Order Releasing Proposed Rules and Seeking Comment on October 8, 2019 ("October 8 Order"). In that Order, the Commission amended the Proposed Rules by (1) expanding the definition section in 001.02, (2) modifying the withholding of NUSF support in 001.03 (3) adding a proposed rule on community-based redirection of support in 001.04, and (4) modifying the reverse auction section of the proposed rule in 001.05. The October 8 Order invited comment on the amended Proposed Rules; CenturyLink hereby offers the following comments.

4. As an overarching observation, while CenturyLink appreciates the Commission's desire for flexibility, the proposed rules, as amended, lack the clarity and specificity required to fulfill the legislative mandate and the universal service principles, including, but not limited to, the need for ". . . specific, predictable, sufficient, and competitively neutral mechanisms to preserve and advance universal service."³ The Commission's anticipation of "issues that will need to be more appropriately addressed during the time and place of a factual examination as to whether to withhold support and conduct an auction,"⁴ heightens these concerns. That a provider will not know under which circumstances its funding is subject to being withheld until "factual examination" concerning the withholding of funds is counterintuitive, unpredictable and forces providers to be reactive as opposed to proactive. While the legislature clearly intended to give the Commission broad discretion to implement Neb. Rev. Stat. § 86-330, the Legislature simultaneously mandated the Commission to adopt any

³ Neb. Rev. Stat. § 86-323(5).

⁴ October 8 Order at p. 3.

necessary rules and standards, and it is axiomatic that such rules and standards must not conflict with existing law, including those laws pertaining to universal service.⁵

Proposed Rule 001.02 – Definitions

5. “Unserved Area” and “Underserved Area” are both defined in Section 001.02(F) but not used otherwise in the Proposed Rules. Any redirection of NUSF to support broadband infrastructure should be limited to unserved or underserved areas as required by Neb. Rev. Stat. § 86-330, which directs the commission to consider a reverse auction program “to support high-speed Internet infrastructure deployment projects in unserved or underserved exchanges within the State of Nebraska.” This limitation is consistent with the rules that incumbent carriers must follow as well as the process used by the FCC for Connect America Funding, which is cited in Neb. Rev. Stat. § 86-330.

6. The amended Proposed Rules use the term “successful investment” for the first time. Specifically, Section 001.03(A)(i)(b) allows the Commission to withhold support from an ETC that “*fail[s] to follow the criteria for successful investment of Support from the Fund*”. The amended Proposed Rules do not define or otherwise identify the criteria for successful investment, nor is that term defined in statute. Nebraska Revised Statute § 86-330 requires the Commission, among other things, to “establish standards governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund.” Because the failure to follow criteria for successful investment would result in a withholding of funds, that term should be defined or the standard set forth in a subsequent section of this Rule.

⁵ Neb. Rev. Stat. §§ 86-301 – 330.

Proposed Rule 001.03 – Withholding of Support

7. In its initial comments submitted on April 18, 2019, CenturyLink commented that the Commission’s proposed rules for the withholding of NUSF support was potentially inconsistent with Neb. Rev. Stat. § 86-330 because the proposed rules did not establish standards governing the withholding of NUSF support as required. Although CenturyLink recommended the Commission develop detailed rules that provide specificity regarding how and when the Commission would open an investigation and withhold portions NUSF support as required by Neb. Rev. Stat. § 86-330, the Commission’s Proposed Rules, as amended, do not establish any such standards. Rather, the Commission noted in its October 8, 2019 Order that such detailed rules would “impose additional burdens on consumers or the Commission” and that “any affected carrier would have the opportunity to raise procedural issues in the scope of a proceeding if inconsistent with the Commission's general rules of procedure.”

8. The Commission’s intent to only “set a general framework”⁶ for implementing Neb. Rev. Stat. §86-330 is inconsistent with the plain reading of the statute, which requires the Commission to *“adopt and promulgate rules and regulations that establish standards governing the withholding of funding from the Nebraska Telecommunications Universal Service Fund from any recipient, including the provision of notice and the right to a hearing prior to the issuance of an order withdrawing such funding.”* The concerns raised by CenturyLink in its April 18, 2019 comments are equally applicable to the amended, Proposed Rules. As such, CenturyLink incorporates by reference its April 18, 2019 comments regarding the need to establish standards governing the withholding of NUSF support as required in Neb. Rev. Stat. § 86-330.

⁶ October 8 Order at p. 3.

9. In addition to the general lack of specificity, Proposed Rule 001.03 does not specify what portion or amount of NUSF support that may be withheld. The NUSF funds four programs that serve rural Nebraska and low-income Nebraskans: the Nebraska Telephone Assistance Program, the Broadband Program, the High-Cost Program, and the Rural Telehealth Program. The High-Cost Program is designed to foster and promote “supported services” such as basic voice services⁷ and qualifying broadband projects. Funding for the latter can be separated into two categories: (1) funds not identified by the carrier for a specific project and, therefore, not approved for project deployment and (2) funds for which a qualifying project has been identified and approved by Commission for deployment but the funds have not yet been disbursed. Neither Neb. Rev. Stat. § 86-330 nor the Commission’s Proposed Rule identify the category of funds that may be withheld; however, withholding funds that have already been approved for a grant project but not yet disbursed seems untenable and would prevent NUSF recipients’ planning and deployment of broadband projects, many of which require a 2-3 year planning period. Further, if funding is withheld from the unassigned broadband portion of NUSF and auctioned to another provider, the Commission will be providing voice network support to the incumbent and broadband grant funding to another provider in the same exchange in violation of its rules governing the High-Cost Program.⁸

10. CenturyLink again urges the Commission to consider establishing appropriate standards governing the withholding of NUSF support as required in Neb. Rev. Stat. § 86-330. The Commission declined to add special procedural requirements that would impose additional burdens on consumers or the Commission for the purpose of determining the availability of broadband and investigating the use of NUSF support. However, the lack of clarity accompanied by vague and ad hoc criteria to determine

⁷ 291 Neb. Admin. Code, § 10:004.02B.

⁸ *Id.* at § 10:004.02G.

when funding may be withheld may cause unnecessary procedural difficulties and possible legal challenges that ultimately frustrate and delay the overall process of awarding NUSF support.

Proposed Rule 001.04 – Community Based Redirection of Support

11. CenturyLink provides its comments to Section 001.04 without the full knowledge of the Commission's intentions of such community-based redirection plans;⁹ however, there are several areas of significant concern with the Proposed Rule relating to such plans. CenturyLink encourages the Commission to reexamine its Proposed Rule and develop more specific guidelines consistent with Commission rules and statutes.

12. While the Proposed Rule contemplates some form of public-private partnership, it is unclear whether such a partnership may receive redirected funding (a) outside of the anticipated reverse auction process or (b) as part of the reverse auction process. The former clearly disregards the legislative directive contained in Neb. Rev. Stat. § 86-330, which explicitly requires a reverse auction for any redirected funds.

13. If the intent of the Proposed Rule is to authorize such community-based partnerships to participate in the reverse auction process, many of the considerations in Proposed Rule 001.04 are unnecessary as the reverse auction process should be uniform for all participants. As such, steps should be developed to ensure the entity granted the NUSF funding has full and irrevocable access to all partner-provided assistance, whether it be financial or technical, before the NUSF funding is provided. Furthermore, to properly safeguard NUSF funds, the Commission should not release funding until the expenditures have been made, consistent with the rules governing incumbent carriers.

⁹ The Commission explained that "such a pathway will be optional for the Commission and not a requirement prior to initiating a reverse auction." October 8 Order at p.3.

14. It appears the Commission intends to allow community-based plans to cover an entire exchange, not just those areas which are unserved or underserved.¹⁰ While CenturyLink acknowledges the role for partnerships with local businesses, hospitals, schools, colleges, agricultural producers, residents, and local public power providers in the overall broadband ecosystem of unserved and underserved areas, no such justification, public policy or otherwise, exists to provide taxpayer funded assistance to locations where broadband is currently available.

15. Further, all community-based plans must include steps and safeguards to ensure the incumbent and all other providers have equal and non-discriminatory access to poles, rights of way, easements, and leasing arrangements.

16. Finally, any community-based plan involving a public power company must prohibit the public power company from utilizing revenues derived from public power to subsidize its broadband participation.

Proposed Rule 001.05 – Reverse Auctions

17. The Proposed Rule should clearly specify that such withdrawn Support is required to be utilized only in unserved or underserved areas within the same exchange for which the Support was originally granted. As previously stated, no public policy rationale justifies the use of taxpayer funded assistance to compete where private investment is already providing broadband services.

18. The winning ETC should be required to follow all the same obligations, rules and requirements imposed upon the incumbent when granted the same funding. This includes the prohibition on using NUSF support for areas where broadband is available as well as any other rules governing the receipt of NUSF funds.

¹⁰ Proposed Rule 001.04(C)ii (referring to “[t]he capability of the ETC to use the proposed technology to provide broadband services to every location in the exchange on a reasonably comparable basis. . .”).

19. The Proposed Rule clearly anticipates the reallocation of NUSF support from one ETC to another ETC; however, the Proposed Rule does not address the impact on the ETC whose funds are withheld. Universal service support is inextricably linked to obligations that are placed upon the incumbent carriers receiving such support. These obligations include, but are not limited to, a duty to provide service, general quality of service requirements, rate regulation, and the like. The redirection of NUSF support to another ETC should include the simultaneous transfer of obligations to the winner of the reverse auction and immediate relief for the carrier losing support. Specifically, the winning bidder in a reverse auction should be required or deemed to have petitioned the Commission to replace the ETC as contemplated in 291 Neb. Admin. Code § 10-004.02G1 and the losing ETC relieved of its ETC obligations in accordance with Section 004.02G2.

20. Finally, if the area involved in the reallocation is less than the full exchange, the transfer of obligations must extend beyond the immediate geographic area affected by the redirection of universal service support because the network infrastructure used to fulfill those obligations cannot be supported in a piece-meal fashion. For example, if an incumbent carrier's infrastructure extends twenty miles from the central office, removing the obligations imposed solely on miles 5 through 10 would have no practical effect as the incumbent's obligations arising from miles 11 through 20 would require it to maintain all points on the network between that span and the central office, including miles 5 through 10. To that end, the Proposed Rule should specifically identify which services a bidder is required to provide and how the reverse auction will be conducted.

Conclusion

CenturyLink urges the Commission to consider its comments and establish more specific and informative standards governing the withholding of NUSF support as required by Neb. Rev. Stat. § 86-330. While, the Commission declined to add special procedural requirements that may burden

consumers or the Commission, the lack of a comprehensive rulemaking may unnecessarily cause legal challenges that ultimately frustrate and delay the overall process. Further, the lack of clarity in other aspects of the rulemaking may hinder the ultimate goal of increased broadband availability in rural Nebraska.

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Respectfully submitted,

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